Halaman Perdana Sdn Bhd & Ors v Tasik Bayangan Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–338 OF 2011
LOW HOP BING, ABU SAMAH AND ABDUL WAHAB PATAIL JJCA
27 MARCH 2012

Contract — Termination — Wrongful termination — Seller of land unilaterally terminated sale and purchase agreement without fulfilling conditions precedent therein — Whether termination wrongful — Whether seller contractually bound to refund deposit paid by purchaser under agreement

The first appellant ('HP') and an entity named MATAD, who were both parties to a joint-venture, each owned a half undivided share in six lots of land ('the land'). By a sale and purchase agreement ('SPA') HP agreed to sell its half share to the respondent ('TB') for RM29.3m subject to the condition precedent that MATAD would consent to the sale and execute the memorandum of transfer and other relevant documents in favour of TB. A further condition was that MATAD would agree to sell its half share in the land to TB for RM37m upon terms and conditions acceptable to TB and subject to a separate sale and purchase agreement being entered into between TB and MATAD ('CP2.1(c)'). Since the conditions precedent were not fulfilled within the stipulated timelines, the parties entered first into a supplemental agreement ('SA') and later into a settlement letter ('SL') both of which sought to vary the terms of the SPA in order to facilitate its completion. Both the SA and SL made it clear that if the terms set out under both agreements were not performed all monies paid under the SPA would be refunded to TB and thereafter the agreements would become null and void. Notwithstanding the SPA, SA and SL and without the terms thereunder being fulfilled, HP unilaterally terminated the SPA and refused to refund to TB the deposit (RM2.9m) it had paid under the SPA. TB filed an action in the High Court to recover the deposit while the appellants raised a counterclaim. The High Court granted TB's claim and dismissed the counterclaim giving rise to the instant appeal to the Court of Appeal.

Held, dismissing the appeal with costs and affirming the decision of the High Court:

(1) It was abundantly clear that HP had failed to fulfil CP 2.1(c) and had also failed to obtain MATAD's consent. In view of HP's non-fulfilment and, indeed, breach of CP 2.1(c), its repudiation of the SPA was not rightful. The repudiation brought the SPA, the SA and the SL to an end thereby imposing an obligation on HP under para 2 of the SL to refund all

monies paid thereunder as money had and received for the use of the party who had paid it ie the purchaser, TB (see para 19).

(2) Both the SPA and the SA culminated in the agreed terms contained in the SL. Under para 2 of the SL, non-fulfilment of paras 1(a) or (b) by the vendor would entitle the purchaser to the refund of the deposit (RM2.9m) and the vendor shall upon demand forthwith refund the said sum to the purchaser (see para 17).

[Bahasa Malaysia summary

Perayu pertama ('HP') dan entiti yang bernama MATAD, yang mana kedua-duanya adalah pihak-pihak kepada usaha sama, masing-masing memiliki sebahagian saham yang tidak dibahagikan dalam enam lot tanah ('tanah'). Melalui perjanjian jual dan beli ('PJB') HP bersetuju untuk menjual sebahagian sahamnya kepada responden ('TB') untuk sejumlah RM29.3 juta tertakluk kepada syarat duluan bahawa MATAD akan memberi izin kepada jualan tersebut dan melaksanakan memorandum pindah dan dokumen-dokumen lain yang relevan memihak TB. Syarat selanjutnya adalah bahawa MATAD akan bersetuju untuk menjual sebahagian sahamnya dalam tanah tersebut kepada TB untuk sejumlah RM37 juta atas terma-terma dan syarat-syarat yang diterima oleh TB dan tertakluk kepada perjanjian jual dan beli yang berasingan yang dimasuki antara TB dan MATAD ('CP2.1(c)'). Memandangkan syarat-syarat terdahulu tidak dipenuhi dalam masa yang ditetapkan, pihak-pihak memasuki dulu perjanjian tambahan ('PT') dan kemudiannya memasuki surat penyelesaian ('SP') yang mana kedua-duanya memohon untuk mempelbagaikan terma-terma PJB untuk memudahkan penyiapannya. Kedua-dua PT dan SP telah memperuntukkan dengan jelas bahawa jika terma-terma yang ditetapkan di bawah kedua-dua perjanjian tidak dilaksanakan kesemua wang tunai yang dibayar di bawah PJB akan dibayar balik kepada TB dan kemudiannya perjanjian-perjanjian akan menjadi tidak sah dan terbatal. Tanpa mengambil kira PJB, PT dan SP dan tanpa terma-terma di bawahnya dipenuhi, HP secara unilateral menamatkan PJB tersebut dan menolak daripada membayar balik kepada TB deposit sejumlah (RM2.9 juta) yang ia bayar di bawah PJB tersebut. TB memfailkan tindakan di Mahkamah Tinggi untuk mendapatkan balik deposit tersebut sementara perayu-perayu membangkitkan tuntutan balas. Mahkamah Tinggi membenarkan tuntutan TB dan menolak tuntutan balas yang mana membangkitkan kepada rayuan ini kepada Mahkamah Rayuan.

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan Mahkamah Tinggi:

(1) Adalah jelas bahawa HP gagal untuk memenuhi CP 2.1(c) dan juga gagal untuk mendapatkan izin MATAD. Mengambil kira HP tidak memenuhi CP 2.1(c) dan, sesungguhnya, kemungkiran CP 2.1(c), penolakannya terhadap PJB tidak sah. Penolakan membuatkan penamatan kepada PJB,

PT dan SP dengan itu mengenakan tanggungjawab ke atas HP di bawah perenggan 2 SP untuk membayar balik kesemua wang tunai yang dibayar di bawahnya kerana wang yang ada dan diterima untuk kegunaan pihak yang membayarnya iaitu pembeli, TB (lihat perenggan 19).

(2) Kedua-dua PJB dan PT disimpulkan di dalam terma-terma yang dipersetujui yang terdapat di dalam SP tersebut. Di bawah perenggan 2 SP, jika penjual tidak memenuhi perenggan 1(a) atau (b) akan memberikan pembeli hak kepada bayaran balik deposit sejumlah (RM2.9 juta) dan penjual akan atas tuntutan membayar balik jumlah tersebut (lihat perenggan 17).]

Notes

For cases on wrongful termination, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6144–6147.

Cases referred to

National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)

Appeal from: Civil Suit No MT 6(5)–22–35 of 2002 (High Court, Kuala Lumpur)

Ranjit Singh (Daya Nair with him) (Nik Saghir & Ismail) for the appellant.
K Kirubakaran (BC Teh with him) (Kiru & Yong) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] The Shah Alam High Court had allowed the plaintiff's claim for RM2,927,382 with interest and costs, and dismissed the defendants' counterclaim. The defendants have appealed against the said High Court decision. We had unanimously dismissed the defendants' appeal. Our grounds are set out below.

FACTUAL BACKGROUND

[2] By consent, parties in the High Court have proceeded on the basis of agreed facts and undisputed documents in order to determine the plaintiffs' claim and the defendants' counterclaim. Parties have dispensed with oral evidence.

[3] Pursuant to a sale and purchase agreement, MATAD Sdn Bhd ('MATAD') paid to the (then) vendor 50% of the purchase price for six lots of

land in the Mukim of Serendah, Daerah Ulu Selangor (collectively 'the land') and was entitled to exercise its right to enter into a joint venture agreement with the (then) vendor or nominee on a 50% – 50% basis. MATAD exercised that right vide joint venture agreement dated 23 April 1993 ('the JVA') with the (then) vendor's nominee ie the first defendant, which then became the owner of 1/2 undivided share in the land.

[4] By sale and purchase agreement dated 28 September 1994 ('the SPA'), the first defendant sold to the plaintiff ('the purchaser') the said 1/2 share for RM29,273,820 subject, inter alia, to three conditions precedent contained in cll 2.1(a)–(c) of the SPA, reproduced below:

2. CONDITIONS PRECEDENT

2.1 Conditions

Completion of this Agreement is conditional upon the following conditions precedent (hereinafter collectively called 'the Conditions Precedent') being fulfilled or waived by the Purchaser, as the case may be, as follows:

(a) MATAD's Consent

The written consent of MATAD to the sale of the said Property by the Vendor upon the terms and conditions herein pursuant to Clause 7 of the JV Agreement within six (6) months from the date hereof (hereinafter called 'the 1st Period') or such extended period as the parties hereto may agree in writing (hereinafter called 'the 1st Extended Period')

(b) Execution of Vendor's Transfer & delivery of documents

The Vendor shall cause MATAD to execute the Memorandum of Transfer in respect of the said Property in favour of the Purchaser and/or its nominee(s) (hereinafter called 'the Vendor's Transfer') and all other necessary and incidental documents and delivered the same to Messrs Nazri Aziz & Wong, Advocates and Solicitors, 5th Floor, Wisma Shen, Jalan Masjid India, 50100 Kuala Lumpur (hereinafter called 'the Purchaser's Solicitors') as stakeholders within the 1st Period or the 1st Extended Period, if any.

(c) Sale of MATAD's Interest to Purchaser

MATAD agreeing to the Sale of MATAD's Interest to the Purchaser and/or its nominee(s) free from all encumbrances and with vacant possession at the purchase price of Ringgit Malaysia Thirty Seven Million Eighty Thousand One Hundred And Seventy Two (RM37,080,172.00) only (hereinafter called 'MATAD's Price') calculated at the rate of Ringgit Malaysia Three and Sen Eighty (RM3.80) only per square foot for 224.0115 acres (hereinafter called 'the 2nd Transaction') and upon the terms and conditions acceptable to the Purchaser AND the Purchaser and MATAD entering into a

sale and purchase agreement in respect thereof (hereinafter called 'the MATAD's Agreement') within the 1st Period or the 1st Extended Period, if any.

('CP 2.1(a), (b) (c)' respectively)

[5] CP 2.1(c) consists of three limbs viz:

(a) MATAD agreeing to sell its remaining 1/2 share at RM3.80 per sqft ('the first limb');

(b) the terms of the sale have to be acceptable to the purchaser ('the second limb'); and

(c) the purchaser and MATAD would have to enter into a sale and purchase agreement within the '1st Period' of 6 months' or the '1st Extended Period' if agreed by the parties ('the third limb').

[6] Clause 2.4(b) and cl 4.4 of the SPA stipulate that if CP 2.1(a)–(b) are fulfilled but not 2.1(c), then the purchaser can elect to waive CP 2.1(c) and complete the purchase, or terminate the SPA and the deposit must be refunded (a reference hereinafter a clause is a reference to that clause in the SPA).

[7] As the vendor was unable to fulfil the timeline stated in CP 2.1(a)–(c), it was extended, by consent, to 27 March 1996.

[8] Thereafter, correspondence dated 10 April 1996 and 25 April 1996 between respective solicitors for the purchaser and the vendor recorded that the purchaser initially agreed to waive CP 2.1(c) and elected to complete the purchase. However, when it was later confirmed that CP 2.1(a) ie MATAD's consent to the SPA had not been fulfilled, the purchaser elected not to waive CP 2.1(c) until CP 2.1(a)–(b) have been fulfilled by the vendor.

[9] By a supplemental agreement dated 30 April 1996 ('the SA'), in relation to the second payment, parties agreed to vary cl 4.2 to the following effect:

(a) the purchaser would, upon execution of the SA, advance the second payment to the vendor's solicitors in order to pay outstanding quit rent and other charges payable by the vendor, and to enable the vendor to fulfil CP 2.1(a)–(b) within six months or any agreed extended period; and

(b) if CP 2.1(a)–(b) were not fulfilled, then the vendor was to refund the deposit and the second payment. Thereafter the SPA would be null and void.

[10] Subsequently, parties mutually agreed to vary the extension of time as

A the vendor was forced to take legal action against MATAD in order to obtain MATAD's consent to comply with CP 2.1(a). The final extension was for six months ie from 30 March 1998–30 September 1998, during which the necessary court order was obtained.

B **[11]** Meanwhile, there were discussions between the parties involving a variation to CP 2.1(c). Instead of obtaining MATAD's consent to sell its portion to the purchaser, the idea was floated that MATAD consent to split the six lots into four plus two lots and that the four lots be transferred to the purchaser with MATAD remaining the owner of the other two lots.

C

[12] This resulted in the settlement letter dated 20 August 1999 ('the SL'); the relevant passages read as follows:

> D The parties have discussed at length the issues relating to the above matter and hereby EXPRESSLY AGREED AND CONFIRM to vary and/or amend the terms and conditions of the Sale & Purchase Agreement dated 28.9.1994 hereinafter referred to as the 'Sale and Purchase Agreement' and the Supplemental Agreement dated 30.4.1996 (hereinafter referred to as the 'Supplemental Agreement' to the extent and only to the extent of the following with all the other terms and conditions E remaining the same and binding on the Vendor and the Purchaser:
>
> (1) the Vendor shall be granted a period of nine months from 20 August 1999 to obtain either of the following:
>
> (a) MATAD Sdn Bhd agreeing and consenting in writing to the sale of their half (1/2) undivided share in the abovementioned Properties to F Purchaser for a maximum consideration as stated in Clause (c) of the Sale and Purchase Agreement; or
>
> (b) MATAD SDN BHD agreeing and consenting in writing to the division and/or distribution of the abovementioned Properties with HALAMAN PERDANA SDN BHD and MATAD SDN BHD G electing in writing to take the following portions of the abovementioned Properties:

C.T. No.	Lot Nos	Area
34713	4455	12.306 acres
H 34715	4456	64.296 acres
34712	4454	99.311 acres
34717	1960	26.69 acres
	202.603 acres	

I OR in the remaining portion of the abovementioned Properties.

(2) In the event the Vendor fails, neglects, omits, refuses and/or is unable to fulfil Clause (1) hereabove within 9 months from the date of this letter, the Vendor shall upon demand forthwith refund all monies paid by the Purchaser to the Vendor, in respect of or pursuant to the Sale and Purchase

> Agreement and the Supplemental Agreement, in particular, the sum of Ringgit Malaysia Two Million Nine Hundred and Twenty Seven Thousand Three Hundred And Eighty Two (RM2,927,382.00) and after the receipt of all monies due and payable to the Purchaser by the Vendor, the Sale and Purchase Agreement and the Supplemental Agreement shall forthwith terminate.

[13] Notwithstanding the SPA, the SA and the SL, vide letter dated 29 May 2000 issued by vendor's solicitors, vendor had unilaterally repudiated the SPA and refused to repay the aggregate sum of RM2,927,382 to the purchaser.

VENDOR'S UNILATERAL REPUDIATION OF SPA

[14] Learned counsel Mr Ranjit Singh (assisted by Ms Daya Nair) submitted for the vendor that as MATAD's consent was secured to sell their portion at RM3.80 per sqft, CP 2.1(a)–(c) had been fulfilled and since the purchaser was clearly dragging its feet, the vendor had rightfully repudiated the SPA. Alternatively, he contended that even if the second limb and third limb in CP 2.1(c) were still applicable, things were already out of the vendor's hands, as the purchaser simply did not take steps to purchase MATAD's 14 share in the land despite numerous reminders.

[15] Purchaser's learned counsel, Mr K Kirubakaran (Mr BC Teh with him) argued that the defendant's repudiation of the SPA was unlawful because:

(a) CP 2.1(c) remained unfulfilled despite the execution of the SA; and

(b) the plaintiff's rights and remedies under the SPA and the SA were preserved by the SL.

[16] The above submissions call for a decision on the following question:

> Upon a true construction of CP 2.1(a)–(c) contained in the SPA, read conjunctively with the SA and the SL in particular paras 1–2 thereof, was defendant 1's repudiation of the SPA rightful?

[17] We observe that both the SPA and the SA have culminated in the agreed terms contained in the SL. More specifically para 1(a) of the SL provides that the vendor has been granted a period of nine months from 20 August 1999 to obtain either MATAD's agreement and consent in writing for the sale of MATAD's 1/2 share to the plaintiff at a consideration of RM3.80 per sqft; or under para1(b) thereof, MATAD's agreement and consent in writing to the subdivision and/or distribution of the land into four lots plus two lots, with defendant 1 and MATAD electing in writing as to their choice of the divided portions of the land. Under para 2 of the SL, non-fulfilment of the para 1(a) or

(b) by the vendor would entitle the purchaser to the refund of RM2,927,328, and the vendor shall upon demand forthwith refund the said sum to the purchaser.

[18] We find that MATAD's two letters dated 08 October 1999 and 18 November 1999, which the first defendant had forwarded to the plaintiff, do not fulfil CP 2.1(c) as:

(a) they are not addressed to the plaintiff;

(b) the asking price for the sale MATAD's 14 share is RM3.95 (as opposed to RM3.80) per sqft;

(c) it does not contain the terms and conditions acceptable to the plaintiff; and

(d) It does not result in the plaintiff and MATAD entering into a sale and purchase agreement.

[19] It is abundantly clear to us that the first defendant has failed to fulfil CP 2.1(c). The first defendant has also failed to obtain MATAD's consent. In view of the first defendant's non-fulfilment and indeed breach of CP 2.1(c), the repudiation of the SPA by the first defendant cannot be rightful. The first defendant's repudiation has brought the SPA, the SA and the SL to an end, thereby imposing an obligation on the first defendant under para 2 of the SL to return or refund all monies paid thereunder as money had and received for the use of the party who has paid it ie in this appeal, the purchaser: see eg *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 (FC).

[20] We wish to state that the question raised before us has been canvassed before the High Court. The learned judicial commissioner had in her well-considered judgment arrived at the correct finding, interpretation and conclusion. We are in entire agreement with her decision.

CONCLUSION

[21] We answered the above question in the negative, dismissed this appeal and affirmed the High Court decision. We awarded agreed costs of RM15,000. Deposit to the respondent (purchaser) on account of the agreed costs.

Appeal dismissed with costs and decision of the High Court affirmed.

Reported by Ashok Kumar